United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7386

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-7386, 76-7393, 76-7417 and 76-7446

VANA TRADING CO., INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

S.S. "METTE SKOU", her engines, boilers, etc., and FLOTA MERCANTE GRANCOLOMBIANA, S.A.,

Defendant-Third-Party Plaintiff-Appellant-Appellee,

—against—

OVE SKOU and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendants-Appellees-Cross-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF VANA TRADING CO., INC. AS APPELLEE AND CROSS-APPELLANT

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Statement

This brief responds to Defendant Flota's brief as Appellant, and contains the cross-appeal of Plaintiff-Appellee-Cross-Appellant Vana Trading Co., Inc. from the judgment

herein in favor of the Plaintiff for a portion of its loss in accordance with the rule of damages as stated by the Court from the bench following the trial of the action, and in its subsequent Opinion.*

Questions Presented on the Cross-Appeal

1. Did the District Court commit error in its application of a comparative fault doctrine to the determination of Plaintiff's damages, by not requiring the Appellant Flota to carry its final burden of proof pursuant to the Rule of *The Vallescura*?

2. Did the District Court err in incorrectly equating the bona-fide purchaser Plaintiff wit' the Shipper, to Plaintiff's detriment?

3. Was the District Court's finding of insufficient packing, despite the overwhelming evidence to the contrary, clearly erroneous?

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* Reported at 415 F.Supp. 884 (S.D.N.Y. 1976) (Pollack, D.J.)

ARGUMENT

POINT I

The trial court committed error in applying a comparative fault doctrine to the determination of plaintiff's damages, by not requiring the appellant Flota to carry its final burden of proof pursuant to the Rule of THE VALLESCURA.

In announcing that the doctrine of comparative fault would apply to the plaintiff's damages, the trial court committed reversible error.

The trial court's citation to its own decision in *Selcamerica, Inc.* v. *SS Barberbrook,* 390 F.Supp. 462 (S.D.N.Y. 1975), was not wholly incorrect, since in that case the parties (defendants only) stipulated to an apportionment. But extension of the rule to the plaintiff was incorrect.

In personal injury cases, maritime law has long held to a contributory negligence rule in apportioning damages. Thus, the citation to *Petition of M/V Elaine Jones,* 480 F.2d 11 (5th Cir. 1973), by the trial court was not incorrect with respect to personal injury actions.

Similarly, the Supreme Court's recent decision in *United States* v. *Reliable Transfer Co., Inc.,* 421 U.S. 397, 1975 A.M.C. 541 (1975) expanded proportional fault to property damage in maritime collisions and strandings.

However, extension of a comparative or contributory fault doctrine to cargo actions in the manner herein has been specifically rejected. The trial court's extension of

Reliable Transfer's contributory rule to the plaintiff in this cargo damage action was incorrect.

> "There is no rule in cargo damage cases which requires the damage to be either equally apportioned among the parties negligent as in mutual fault collision cases * * * or to be proportioned among the parties at fault as in maritime personal injury cases * * *"

David Crystal, Inc. v. *Cunard Steamship Company,* 223 F.Supp. 273, 287 (S.D.N.Y.), *aff'd,* 339 F.2d 295 (2d Cir. 1964) (citation omitted).

There is "* * * no rule of law which would permit a determination of liability upon the basis of the calculation of a certain percentage of due care or the calculation of non-exercise of due care, percentage-wise." *Tri-Valley Packing Ass'n* v. *States Marine Corp.,* 310 F.2d 891, 892 (9th Cir. 1962). *Tri-Valley* was a case where the district court found the carrier liable for only 15% of the damages, the balance being the result of Act of God. The Court of Appeals reversed and granted 100% damages to plaintiff. *Tri-Valley* was cited in *David Crystal, supra.*

The correct rule of proportional damages with respect to cargo damage actions, and the correct method of apportioning those damages was determined by the Supreme Court and preceded its *Reliable Transfer* decision by over forty years. In an action for cargo damage, the bona-fide purchaser-consignee's complaint alleges receipt by the carrier in good order, and delivery in damaged condition; and since the common carrier is an insurer, the consignee-plaintiff is entitled to a full recovery of its damages, excepting as to that portion of the loss which the carrier succeeds in bringing within some statutory exemption or valid con-

tractual exception from liability. *Schnell* v. *The Vallescura,* 293 U.S. 296 (1934); *Clark* v. *Barnwell,* 53 U.S. (12 How.) 272 (1851); *Stirnimann* v. *The San Diego,* 148 F.2d 141, 1945 A.M.C. 436 (2d Cir. 1945).

A. *The Burdens of Proof.*

The Plaintiff's prima facie case therefore proceeds first to show that the cargo was delivered to the vessel in good order and condition, and was delivered at destination in a damaged condition. *North American Steel Products Corp.* v. *Andros Mentor,* 1969 A.M.C. 1482 (S.D.N.Y. 1967) (not reported elsewhere).

When the plaintiff has proved its prima facie case, the burden shifts to the carrier to show if possible that the loss falls within one of the exceptions set forth in 46 U.S.C.A. §1304(2)(a-p) of the U.S. Carriage of Goods by Sea Act. *J. Gerber & Co.* v. *SS Sabine Howaldt,* 437 F.2d 580 (2d Cir. 1971); *Isthmian Lines, Inc.* v. *Tug James T. Moran,* 306 F.Supp. 19, 27 (S.D.N.Y. 1968).

If the carrier does demonstrate such an exception, the burden then returns to the plaintiff to show that there was a concurrent cause of the damage which is not excluded under 46 U.S.C.A. §1304(2)(a-p). *The Sabine Howaldt, supra.*

At that point, the burden shifts back finally to the carrier to separate the damage for which it is not responsible, from the damage for which it is responsible, failing which the plaintiff must recover all of its damages. *Schnell* v. *The Vallescura,* 293 U.S. 296 (1934); *Armco International Corp.* v. *Rederi AB Disa,* 151 F.2d 5 (2d Cir. 1945).

B. ***Application of the Burdens of Proof to the Case Herein.***

The trial court has found that Vana has proved a prima facie case by showing delivery of the yams to the carrier Flota in good order and condition, and that the yams were free of latent pathological disease or injury (A. 16a).

The carrier then sustained its burden of showing that the loss was, at least to a degree, occasioned by insufficient packing (A. 17a), a view not shared by the plaintiff.

The plaintiff, however, then returned to sustain its further burden of showing that the stowage of the yams some thirteen tiers high within the deep tanks subjecting them to a measure of heat was a concurrent cause of the loss (A. 17a). Defendant I.T.O. was also found to be at fault for its harsh handling of the cargo, and for subjecting the yams to unventilated storage following discharge (A. 18a). The negligence of I.T.O. is imputed to the carrier Flota, but is recoverable by Flota in indemnity (A. 19a).

Having reached these findings, the trial court then erred by not returning to the defendant Flota's final burden of separation. In its statement of the rule of law applicable to this case, the trial court stated:

> "The rule is clear that when two or more parties have contributed by their fault to cause property damage in a maritime cargo situation, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault and that liability for such damage is to be allocated equally only when the parties are equally at fault, or when it is not possible fairly to measure the comparative degree of their fault." (A. 18a).

This statement is identically that of *Reliable Transfer,* excepting for the substitution of the words "cargo situation"

for the words "collision or stranding." *Reliable Transfer,* 421 U.S. at 411. It is submitted this was incorrect in a cargo damage action.

The trial court was unable to make a finding as to the allocable percentages of the degree of fault, nor is there any support for such finding in the record. It is implicit in the lower court's findings, and clear from the record, that the defendant Flota failed to carry its final burden of separating that damage coming within the exceptions to liability in COGSA, 46 U.S.C.A. 1304(2)(a-p), from that damage which is not excepted.

Stripping the trial court's Opinion of what plaintiff suggests was an incorrect conclusion, what remains is a decision that the carrier was partly responsible for the loss. However, the parties agreed as between themselves that the degree of fault allocable to each party could not be determined from the evidence (A. 7a); and the court itself stated that the exact proportional loss could not be determined on the record (A. 18a-19a), and could only be estimated. The trial court did not choose to clarify the uncertainty as between Flota and Vana which led to the trial in the first instance. The trial court merely approved a stipulation as between Flota and Vana to divide the damages equally, based on the rule of damages as stated by the Court. Pursuant to the doctrine of the *Vallescura, supra,* the plaintiff ought to receive 100% of its damages.

C. *Flota's Unfulfilled Duty to Segregate the Damages.*

The Trial Court chose to disregard the well-settled watershed rule of cargo damages founded in *Schnell* v. *The Vallescura,* 293 U.S. 296 (1934) which defines the carrier's final burden:

"Where the state of the proof is such as to show that the damage is due either to an excepted peril or to the carrier's negligent care of the cargo, it is for him to bring himself within the exception or to show that he has not been negligent * * *.

Similarly, the carrier must bear the entire loss where it appears that the injury to cargo is due either to sea peril or negligent stowage, or both, and he fails to show what damage is attributable to sea peril." 293 U.S. at 306.

The rule of the *Vallescura* has been restated and followed in the Second Circuit. *Gerber & Co.* v. *SS Sabine Howaldt,* 437 F.2d 580, 588 (2d Cir. 1970); *Lekas & Drivas, Inc.* v. *Goulandris,* 306 F.2d 426, 431 (2d Cir. 1962); *Empresa Central Mercantil de Representacoes Ltda.* v. *Republic of the United States of Brasil,* 257 F.2d 747 (2d Cir. 1958); *Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro,* 159 F.2d 661, 665 (2d Cir. 1947); *Edmond Weil, Inc.* v. *American West African Line, Inc.,* 147 F.2d 363, 366 (2d Cir. 1945); *Armco International Corp.* v. *Rederi AB Disa,* 151 F.2d 5 (2d Cir. 1945); *Pioneer Import Corp.* v. *The Lafcomo,* 138 F.2d 907, 908 (2d Cir. 1943); *Wessels* v. *The Asturias,* 126 F.2d 999, 1001 (2d Cir. 1942). The principle is considered and discussed in G. Gilmore & C. L. Black, The Law of Admiralty §3-38, at 169-73 (2d ed. 1975).

In this case, the record is barren of testimony presented by defendant Flota as to what portion of the damages is attributable to excepted causes, and what portion is attributable to concurrent causes of negligence. This was Flota's burden.

Appellant Flota's reliance, in its brief at page 37, upon *The Niel Maersk,* 91 F.2d 932 (2d Cir. 1937), *cert. de-*

nied, 302 U.S. 753 (1937), is totally misplaced. The Court was confronted in that case with a situation where, although a concurrent cause of the loss was proved to be insufficient ventilation for which the carrier could be held liable, nevertheless, the libellant failed to prove its initial burden that the shipment was in good order and condition when tendered to the carrier. The rule of the *Vallescura* was cited and explained, but the shifting burden was held to apply only where the cargo claimant initially proves a prima facie case.

For virtually the same reasons, Appellant's reliance on *Commodity Service Corp.* v. *Hamburg-American Line,* 354 F.2d 234 (2d Cir. 1965) is also inapposite, as a case in which, again, the plaintiff had failed in its initial burden.

The findings of the trial court in the case at bar leave no doubt that plaintiff has proved a prima facie case and that the loss occurred in transit (A. 16a). This case clearly falls within the rule of *The Vallescura,* while *The Niel Maersk* and *Commodity Service* fall without it. *States Marine Corp.* v. *Producers Coop Packing Co.,* 310 F.2d 206 (9th Cir. 1962).

Plaintiff Vana agrees with Flota's argument, brief page 38, that the trial court was erroneous in its reliance upon *United States* v. *Reliable Transfer Co.,* 421 U.S. 397 (1975), and *Selcamerica* v. *SS Barberbrook,* 390 F.Supp. 462 (S.D.N.Y. 1971). *Reliable Transfer* is limited to the rejection of the Admiralty rule of divided damages in collision and stranding cases, and has no application to cargo damage cases. The *Barberbrook* clearly has no application to a division of damages as between the cargo claimant and the carrier, since that holding was limited to a division

of damages as between two joint tortfeasor defendants (shipowner and charterer).

The Vallescura doctrine is hardly an out-moded concept. It is based upon the well-settled principle of the common law that a tortfeasor "but for" whose conduct the damage would not have occurred is responsible for all the damages. W. Prosser, Torts §41, at 239 (4th ed. 1971).

Plaintiff Vana strenuously objects to Flota's placing the burden of segregation of the damages at Vana's doorstep, Flota brief page 38. The rule is clearly the reverse: where there is concurrent fault, the burden is upon the carrier to perform the segregation, in accordance with the rule of *The Vallescura* and its progeny.

POINT II

The trial court incorrectly equated the plaintiff-consignee with the shipper, charging it with packaging defects. The defective packaging is not supported on the record.

A. *The Insufficiency of the Packing, If Any, Was Not the Fault of the Plaintiff Vana, Who Was Not the Shipper.*

The Plaintiff herein, Vana Trading Co., Inc., was a bona-fide purchaser for value, through an irrevocable letter of credit. (Stipulation, A. 34a).

The trial court, however, equated and confused the consignee-plaintiff with the shipper. In its Opinion, the Court stated:

> "Thus, the damage was due to a combination at least of the circumstances created or contributed to by the shipper and the Charterer and was enhanced by the

> manner of performance of I.T.O. of its obligations." (A. 17a).

And:

> "When there is concurrent fault in the fashion described, the loss occasioned thereby does not entitle a shipper to whom some of the fault is attributable to claim a recovery for the full value as a premium for its fault." (A. 18a).

What the Court has said is clear enough; it was found that the shipper's packaging was not optimal, which contributed to the loss. Plaintiff contends that this finding is not supported on the record, and that the packing used was customary and normal (see *infra*).

If the shipment was improperly packaged, and "fault" for the loss thereby attaches to the packing of the goods, it is not the bona-fide purchaser plaintiff, who was the consignee of the shipment, who should bear any part of the loss, since it is the shipper who warrants that the goods were properly packed. "As between carrier, shipper and consignee, the consignee would be least likely to possess the necessary knowledge to have avoided any difficulty arising from improper packaging." *Atkins, Kroll & Co.* v. *Nedlloyd Line,* 210 F.Supp. 315, 317 (N.D. Cal. 1962).

The trial court penalized the plaintiff for something over which it had no control. The plaintiff was not the shipper. Nor did the plaintiff exercise control over the shipper in the type of packing to be used.

Unquestionably, the defendant carrier may avail itself of the defense of "insufficiency of packing" as one of the enumerated defenses of COGSA, regardless of whether fault is thereby attributable to plaintiff. By ascribing the

packaging to the plaintiff, however, the trial court has incorrectly placed the bona-fide purchaser plaintiff, holding a clear bill of lading, in the position of a joint tort-feasor.

B. *The Carrier Had Knowledge of the Packing, and Accepted the Cargo Without Objection.*

The carrier was bound to exercise such care as the goods by their nature required, and is liable for failure to exercise such care, even though the damage comes under an exception to carrier's liability. *The Kerlew,* 43 F.2d 732 (S.D. N.Y. 1924):

> "The ships were not compelled to accept cargo insecurely packed; if they did so, and as a result of their handling the goods were damaged, certainly as between [the] libelant and themselves, it is only fair that they should stand such loss." 43 F.2d at 736.

The Chief Mate of the METTE SKOU testified that he and the Master had examined the yams prior to shipment, by opening the cartons, and removing the paper wrappings. (A. 480a; 509a). Nevertheless, the yams were accepted for shipment, without noting any objections to the packing.

> "The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." 46 U.S.C.A. §1303(2) (1975).

These duties of the carrier are non-delegable. Surveys, certificates, or other alleged expressions of approval by a shipper or its agent as to the carrier's undertaking are not sufficient to discharge the carrier's obligations or exonerate it from liability for improper stowage, ventilation, or discharge of the cargo. *Oxford Paper Co.* v. *The Nidarholm,* 282 U.S. 681 (1931); *Nichimen Co.* v. *M/V Farland,* 462 F.2d 319, 329-30 (2d Cir. 1972); *The Skipsea,*

2d [illegible], 888-89 (2d Cir. 1925), *cert. denied*, 271 U.S. 671 (1926); *Blanchard Lumber Co.* v. *SS Anthony II*, 259 F.Supp. 857, 867 (S.D.N.Y. 1966); H. Longley, Common Carriage of Cargo §9.05, at 78 (1967).

C. *The Stowage Was the Principal Culprit.*

It is implicit in the lower court's finding that the packing itself was sufficient provided that proper stowage was afforded. From a theoretical standpoint, "packing" can be blamed for almost any type of damage loss, as it is but a truism that the packing of any commodity can be improved to withstand successively greater stresses. But the standard to which the sufficiency of the packing must be measured is in relation to the normal and expected hazards of ocean transport, and not to unexpectedly high risks.

When the cartons of yams were given to the ship, they were possessed of certain characteristics which are inherent in all yams. The lower court did not find otherwise. The type of packing afforded to the yams was also a characteristic which was fully known to the carrier when loaded. (A. 480a-509a).

Had the carrier properly transported the yams, the shipment would have arrived in New York undamaged, since the packing alone would not have caused the loss. (A. 17a). Given the characteristics of the cargo entrusted to its care, it was Flota's choice of the place and manner of stow which determined the events that followed.

It is clear, that "but for" the negligent stowage, the loss would not have occurred. *In re Irish Shipping Ltd. Lim. Procs.*, 1975 A.M.C. 2559 (S.D.N.Y. 1975) (not otherwise reported). The packing should therefore be exonerated as a cause of the loss.

D. *The Packaging Was Normal and Customary.*

The plaintiff's President, Sousa, testified that the packaging was normal, customary, and the standard in use. (A. 48a). He made the point that there was no real distinction between those boxes with additional side ventilation holes, and those with only the top and end-ventilation holes, except greater collapsibility. (A. 49a-50a).

The shipper's General Manager stated the boxes had been in use for some five years, and were normal and customary (A. 434a-435a). He further stated that the unprinted newspaper wrap was loose (A. 389a), and was used to avoid chafing between yams (A. 390a).

Surveyor McCabe stated the paper wrapping was loose (A. 195a), was to prevent bruising and was the customary way of shipping the yams (A. 195a-196a).

Expert surveyor Hansen, called by defendant Skou, stated that the cartoned boxes and paper wrappings had been customary since 1971 or 1972 (A. 309a-310a). He further stated that lack of side vent holes did not mean the yams could not outturn good. (A. 308a).

The plaintiff's expert Axiotes, when asked hypothetically by defense counsel whether or not tight paper wrapping of yams would be detrimental, replied in the affirmative. (A. 217a-218a). When asked whether loose wrapping, which was not rebutted, would impede circulation, he replied that would give the gas an opportunity to escape. (A. 221a-222a).

Appellant Flota's Hatch Survey Report, Exhibit 9, states the cartons were the customary type. (A. 362a). Appellant Flota's Damage Survey Report, Exhibit 8 states: "A com-

parison of the yams in cartons with ventilation holes in the sides and those without revealed no difference in their condition." (A. 355a).

Despite this preponderance of contrary evidence, the trial court found that the cartons and wrapping were unsuitable. (A. 17a).

The trial court, however, also found that the packaging alone probably would not have resulted in the damage. (A. 17a). Having equated the bona-fide purchaser-plaintiff with the shipper, the court cast the plaintiff into the role of a party able to avoid the consequence of the damages, by some mystical legerdemain which would have resulted in a different packaging from the normal and customary, but which would have withstood the deep tank stowage given the yams.

The trial court's finding that the packaging was insufficient was clearly erroneous. That it may have flowed from confusion that the plaintiff was the shipper, only gives greater plausibility to the reasoning leading to this clearly erroneous finding, which should be reversed.

POINT III

The trial court's finding that the yams had been shipped in good order and condition and free of inherent defects is supported by substantial evidence.

A. *There Was Substantial Evidence as to the Actual Condition of the Yams Prior to Shipment.*

It is argued by appellant Flota that the yams were not in good order and condition upon shipment, despite the specific finding of the lower court that they were (A. 16a) and that plaintiff's prima facie burden was thus never met.

The trial court found:

> "That burden was carried by the plaintiff, since the preponderance of the credible evidence, including the testimony of experts and others who inspected the yams in New York, as well as the proof concerning the condition and handling of the yams in Colombia, demonstrated that the damage suffered by the cargo was caused by the conditions to which it was subjected in transit, and not by any inherent defects." (A. 16a)

In evidence were the deposition of the shipper's General Manager, Arturo Mejia (A. 369a) and the Colombian Agricultural Department (ICA) pre-shipment inspection (A. 34a). Selected portions of the testimony of Mejia were read into the record at the request of the Court, though the entire deposition was later admitted into evidence as Exhibit 13. The certificate of the Colombian ICA was stipulated to by both Vana and Flota and it states that the yams were found to the best of the inspectors' knowledge to be substantially free of injurious disease and pests and were believed to conform to the current sanitary regulations of the United States.

There was evidence that the yams were at the time of shipment in apparent good order and condition. (Bill of Lading, Exhibit 5, A. 352a; and A. 33a). The testimony of Larsen, the Chief Officer, showed that he and the Master had opened boxes of yams and examined them prior to shipment (A. 480a; 509a). The shipper's General Manager, Mejia, testified to the actual good order. He described the type of yam exported (A. 375a); to the growing (A. 379a); the selection and packing of the yams (A. 388a-389a); and final inspection just before shipment (A. 413a-414a). The

brand name "Super Seleccionado" was explained (A. 436a-437a). Mejia testified that these Colombian yams may normally be warehoused from eight to ten months (A. 385a), as did the plaintiff's President Sousa (A. 51a).

The survey reports of defendant-appellant Flota's surveyor were most revealing. The discharge hatch survey, Exhibit 9 (A. 361a-363a) showed the customary cartons, and that the damage appeared to be the result of heating, probably caused by inadequate ventilation in stow. A later damage survey by Flota, Exhibit 8 (A. 354a) reached the same conclusion:

> "The pattern of damage in stow indicated a condition caused by cargo heat due to inadequate ventilation. There was little damage to the Yams stowed in the top tiers because they apparently had received some ventilation . . . and the condition reached its most advanced stages in cartons stowed in or near the bottoms of the tanks." (A. 357a-358a).

The yams involved in this suit were stowed below the two other shipments in the deep tanks. (A. 357a, paragraph 2).

From all of this, as well as other evidence, the Court could and did readily conclude that the yams were in good order and condition when shipped.

The defendants offered no evidence of shipment in bad condition. The defendants during the trial, suggested the possibility of bad condition, but the mere suggestion of bad condition, without more, is not evidence. *Ocean Commercial Co., Inc.* v. *The Polycarp,* 134 F.Supp. 834, 835-37 (S.D.N.Y. 1955).

The trial court's finding that the yams were in good order and condition upon shipment was not clearly erroneous, and

should not be set aside. *McAllister* v. *United States*, 348 U.S. 19, 20 (1954); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

B. *Defendants Failed to Prove the Defense of Inherent Vice.*

It was defendants' burden to prove inherent vice as an exception to liability under COGSA, 46 U.S.C.A. §1304(2). It is clear that defendants did not sustain this burden, as indicated by the trial court.

> "There is a suggestion from the defendants that the yams may nonetheless have suffered from some inherent vice and it is unclear that they did not. However, no finding can be made that there was inherent vice." (A. 16a).

Again, the mere suggestion of the vice, without more, is not evidence. *The SS Polycarp, supra.*

The important case of *Daido Line* v. *Thomas P. Gonzalez Corp.*, 299 F.2d 669 (9th Cir. 1962) is instructive in this regard. There, in an action for damage to a shipment of garlic, the carrier made the same argument as does Flota herein.

Because a pre-shipment inspection showed some surface moisture and mold, which because of the perishable nature of the cargo would be expected to cause deterioration of the garlic, the carrier argued that a finding of no inherent defect was erroneous on its face. To this, the Court of Appeals stated:

> "Of course, the garlic was not perfect. The certificates reflected decay, mechanical damage, and mold * * * But, * * * all garlic [is] subject to these deficiencies in some degree, and * * * properly cared for, this cargo would have survived the trip. A higher standard

> of proof than this would exclude all ordinary perishable cargo from the rule imposing liability on the carrier for unexplained deterioration of goods in its care." 299 F.2d at 674.

In *Daido Line,* the Circuit Court upheld the District Court's finding that there was no inherent vice. The same situation prevails herein. No cargo is really perfect, especially perishable cargo. As the trial court agreed, the yams were not newly harvested, and they were (as all produce is) therefore more susceptible to damage by their subsequent treatment in transit.

Merely because the cargo was of a perishable nature, it cannot be presumed that the damage was the result of the natural tendency of perishables to deteriorate; it is the carrier's burden to affirmatively prove the inherent vice, defined as those "existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time." *Missouri P.R. Co.* v. *Elmore & Stahl,* 377 U.S. 134 at 136, 139 (1964). Defendant Flota has failed to meet that burden.

POINT IV

The plaintiff's damages were supported by the evidence.

The defendant-appellant Flota, in its Brief, Point VII, at pages 34-39, spews forth a host of objections to the plaintiff's damages. The most startling is the thought that the market value of Colombian Yams at the time was not $16.50 per carton. This sound market value had been stipulated to at the trial (A. 40a), and should not require further discussion.

Flota argues that the extent of the dumping was inconclusive; yet the evidence showed the vast majority of the yams to be commercially worthless, necessitating dumping (McCabe, A. 185-186a; Flota Report, A. 356a, paragraphs 3, 5, and 9). Bills for all cartons dumped were introduced into evidence, and although some of them were questioned by defendants, which was perhaps what gave rise to the inconclusiveness argument, nevertheless, no other reasonable disposition of the yams was suggested or established.

Flota argues that the Plaintiff failed to obtain a duty refund in mitigation of damages, Appellant's Brief page 36. The plaintiff's President testified that such refunds were not obtainable (A. 107a). No contrary evidence was introduced by the defendant. It was defendant's burden to show the availability of such a duty refund. *Dixie Plywood Co.* vs. *SS Federal Lakes,* 404 F.Supp. 461, 465 (S.D Ga. 1975).

POINT V

The trial court's finding that Flota and I.T.O. were liable, to the exclusion of Skou, is not clearly erroneous.

Contrary to the finding of the Trial Court that Skou was not liable in indemnity to Flota (A. 15a), the brief of appellant Flota, Point V at page 29, argues that Skou's *in personam* lack of liability should also exonerate Flota. Flota's Point IV, especially pages 24-26 argues similarly, with respect to the stowage and ventilation. This is not correct reasoning.

It is entirely consistent that a vessel owner may be exonerated on a finding that the warranty of seaworthiness was not breached; while a vessel charterer may be held liable due to improper stowage, and other factors attributable to the charterer by the charter party. *International Produce, Inc.* vs. *SS Frances Salman,* 1975 A.M.C. 1521, 1544-47 (S.D.N.Y. 1975); G. Gilmore & C. L. Black, The Law of Admiralty §4-17 at 232-33 especially n. 125a (2d ed. 1975) (citations omitted).

It should be recalled that Vana's complaint lay *in personam* against the carrier Flota under the bill of lading contract signed by Flota's Cartagena Agents (A. 33a); that the vessel owner Skou appeared *in personam* in response to Flota's third-party complaint; and that no *in rem* action or jurisdiction is involved herein. (A. 1a-2a).

Flota was held liable herein, and Skou was not, because of the responsibilities delegated as between those two parties by a Charter Party (Exhibit L, A. 451a), which was not incorporated into the bill of lading (Exhibit 5, A. 352a).

Though Plaintiff sympathizes and agrees with the Charterer's argument that the negligence of the Master and Chief Mate were the principal factors in the damage herein, it must nevertheless be crystal clear that under the charter party, the vessel's crew acted as agents of the charterer for the loading, stowage, and carriage of the cargo. Thus, despite the numerous poor practices in connection with the carriage of this cargo of yams, including the selection of deep tanks rather than 'tween deck stowage; the stowage itself; the consequent poor ventilation and heat build-up; the delay in delivery; and the negligent actions of I.T.O.; all of those practices are imputed to the charterer Flota under the Charter Party. *Nichimen Co.* v. *M/V Farland,* 462 F.2d 319, 331-32 (2d Cir. 1972); *International Produce, Inc.* v. *SS Frances Salman,* 1975 A.M.C. 1521, 1544-45 (S.D.N.Y. 1975).

POINT VI

Flota is entitled to partial, but not full indemnity from I.T.O., for I.T.O.'s negligence.

Stevedores are liable for any damage caused by their negligence. *Robert C. Herd & Co.* v. *Krawill Machinery Corp.,* 359 U.S. 297 (1959).

The trial court's finding, that ITO's conduct during discharge and its storage of the yams thereafter prior to delivery, contributed to and aggravated the fault assessable against Flota (A. 17a-18a), is supported by substantial evidence, and is not clearly erroneous. Appellant Flota has detailed many of I.T.O.'s defalcations with respect to the discharge and delivery in its brief at Point VI, pages 29-32, which plaintiff does not dispute.

Plaintiff does dispute that these facts and findings should automatically lead to full indemnification of Flota by I.T.O. The trial court's Opinion expresses to the contrary, that:

> " • • • the liability of I.T.O. to Flota represents a claim over by Flota to the extent that I.T.O. contributed to the damage. It does not increase the amount of plaintiff's claim but is an element in determining the comparative fault of Flota and I.T.O." (A. 19a).

This is essentially a correct statement of law. *Demsey & Associates, Inc.* v. *SS Sea Star*, 461 F.2d 1009, 1017 (2d Cir. 1972).

The trial court's Opinion (A. 20a) clearly shows that the assessment of I.T.O.'s liability at a mere $1,000 was determined solely by and between I.T.O. and Flota. Flota's argument in Point VI in its brief at pages 33-34, that the court should have granted full indemnity against I.T.O., rather than limit such indemnity to $1,000 must be read in that light.

Having offered the parties the opportunity to assess their respective damages, which Flota and I.T.O. did privately, appellant Flota should not now be heard to imply that the Court had suggested the actual amount of the $1,000 assessment. In this regard, the distinction between the stipulations of Flota-Vana, and Flota-I.T.O. may be correctly adjudged. In the former, the court strongly suggested the result, based on the rule of damages enunciated; while in the latter, no particular division was suggested or implied.

CONCLUSION

The judgment of the Trial Court should be affirmed or, in the alternative, should be modified to the extent of granting Vana its total loss of $78,358.50.

Dated: New York, New York
November 5, 1976

Respectfully submitted,

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